



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Miscellaneous Civil Application 12, 13, 38 & 45 of 2011

FANCY TRADERS LIMITED.....APPLICANT

VERSUS

THE LAND REGISTRAR, MOMBASA.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE MINISTER FOR LANDS.....3RD RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 13 OF 2011

ADROIT DEVELOPERS LIMITED.....APPLICANT

VERSUS

THE REGISTRAR OF TITLES, MOMBASA.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE MINISTER FOR LANDS.....3RD RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 38 OF 2011

LAILE INVESTMENTS LIMITED.....APPLICANT

VERSUS

THE REGISTRAR OF TITLES, MOMBASA.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 45 OF 2011

SUPER NOVA PROPERTIES LIMITED..... APPLICANT

VERSUS

THE LAND REGISTRAR, MOMBASA.....1ST RESPONENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE MINISTER FOR LANDS.....3RD RESPONDENT

JUDGMENT

(1) This is the Judgment in the Judicial Review proceedings Nos. 12, 13, 38 and 45 of 2011 respectively between **Fancy Traders Ltd v. Land Registrar, Mombasa and 2 Others; Adroit Developers Ltd v. Registrar of Titles, Mombasa & 2 Others; Laile Investments Ltd v. Registrar of Titles, Mombasa and Another; and Super Nova Properties Ltd v. Land Registrar, Mombasa and 2 Others.**

(2) Although the submissions in these proceedings were made separately by way of written submissions, I while considering Judgment therein took the decision to consolidate them for purposes of the Judgment because the facts giving rise to the causes of action and the reliefs sought in each of them are similar and require consideration of the same legal principles.

(3) The applications in these proceedings challenge the actions of the Registrar of Titles and the Land Registrar, Mombasa in purporting by Gazette Notices Nos. 11533, 15570 and 15572 of 2010 to revoke the Applicants' titles to suit properties. The Gazette Notices were in similar terms that the parcels of land whose details were therein described were allocated and title issued to private developers while the same had been reserved for public purposes and that the allocations were therefore illegal and unconstitutional prompting the government to revoke the titles in view of the public need and interest.

(4) The respective Applicants as title holders in the consolidated suits have challenged the Gazette Notices on three principal grounds that the revocation of titles is ultra vires as the Registrar has no powers to revoke titles; that the decision to revoke titles was reached without due process in accordance with the rules of natural justice; and that it was unconstitutional interference with their right to property amounting to compulsory acquisition of the property without compensation. The Applicants seek the orders of certiorari and prohibition with respect to the Gazette Notices and the Applicants in JR 12, 13 and 45 of 2011 seek further order of mandamus to reinstate the Applicants in the Register of Titles. Although the order of mandamus is not sought by the Applicant in JR 38 of 2011, the same is a consequential order in the circumstances of these proceedings which would follow upon the grant of the other two judicial review orders.

(5) The applications were served on the Respondents and the Hon Attorney General but no appearance, replying affidavits or submissions were filed on behalf of the Respondents in any of the proceedings. Indeed in JR 13 of 2011, Mr. Kamau State Counsel for the Attorney General confirmed to the court on 9th December 2011 that the Respondents would not be filing submissions in the matter.

(6) Before the impugned Gazette Notices which gave rise to these judicial review proceedings, there were in two of the judicial review proceedings – JR 38 and 45 of 2011 – pending court proceedings at the High Court Mombasa being, respectively, Msa HCCC No. 180 of 2009 and Msa HCCC 429 of 2009 in both of which Kenya Anti-corruption Commission has sued for nullification of the title over the legality of the allotment property. To my knowledge, these proceedings are still pending determination before the High Court.

(7) As I observed in a recent decision **JR 85 of 2011, R v. The Land Registrar Wundanyi and 2 Others ex p. David Muturi Kimana.**

The courts have, in considering the numerous cases arising from the revocation of titles by Gazette Notices in 2010, been unanimous that the Registrar of Titles, the Land Registrar or the Commissioner for Lands have no power to revoke title to land and that that is the province of the courts. I referred to some of the decisions of the High Court being **R v. Kisumu District Land Officer & Another Misc. Appl. No. 80 of 2010 (eKLR)** and **Kuria Greens Ltd v. Registrar of Titles & Another 2011 (eKR)**.

I have also noted the decision in **Nairobi Petition No. 128 of 2011, Power Technics Ltd v. Attorney General and 2 Others** to the same effect.

(8) I my own decision in **R v. Registrar of Titles exparte Benard Atati JR 24 of 2011 of 12th March 2011**, I considered the Gazette Notice No. 15570 challenged herein and held as follows:

“The Gazette Notice No. 15570 attempts to justify in Government’s decision by a declaration that as the parcels of land which had been allocated to private developers “were revoked from public purposes under the relevant provisions of the Constitution, the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) the allocations were therefore illegal and unconstitutional.” Such a declaration is the constitutional province of the courts and to use it to justify the otherwise unauthorized revocation of titles is an unconstitutional infringement of the directive of separation of powers by the lands department of the executive governed while the government may take that constitutional view of things, it is only the court that can make authoritative and binding decision on constitutional interpretation and therefore the Executive cannot be excused from the unconstitutionality of its action by its partisan interpretation of undisclosed constitutional provisions.

Even if the Government sought to reset the situation to the pre-alienation position before the parcels of land were, in the orders of the Gazette Notice, “allocated and titles issued to private developers”, it was delegated by the constitutional provisions on protection of private property under Article 40 of the Constitution to pay full compensation and subject to the owners rights of access to court under Article 40 (3) (b) (ii) of the Constitution of Kenya. The transaction to reverse the allocations could not have been done by bilateral declaration by a Gazette Notice.”

That is the view I take of the constitutional issue raised in the consolidated judicial review proceedings.

(9) I also found that the Registrar of Titles had no authority to revoke titles to land. The Land Registrar does not similarly have power to revoke titles to Land registered under the relevant statutory provisions. In view of the illegality of the revocation by the principle for ultra vires, I held it to be immaterial that the Registrar did not afford the Applicants a right to be heard contrary to rules of natural justice. I said:

“Having found that the Government through the Commissioner of Lands or the Registrar of Titles had no authority to revoke titles to land the subject of Gazette Notice No. 15570, I need not go into the enquiry with the mode of exercise of the revocation. However, on the strength of the uncontroverted facts that the Applicant was not invited to make representations or otherwise given an opportunity to be heard before the decision to revoke the titles was taken; that no reasons were given to the Applicant before the decision save the statement in the Gazette Notice that the parcels of land were revoked from public purposes; that no consideration was given to the applicants’ substantial was by the Respondents’ decision; and the unreasonableness of the situation that the parcel of land had been allocated by the same government departments which ought to have known that the land was reserved for public purposes, I would find also that the 1st Respondent is guilty of unfair destructive action contrary to provisions of Article 47 of the Constitution.”

I find that the above holding applies with equal currency to the present proceedings. In the circumstances, the Applicants are entitled to the discretionary judicial review remedies in the absence of any replying affidavits on the part of the Respondents indicating any exceptional circumstances, which may dictate against the grant of the reliefs sought.

(10) Accordingly, for the reasons set out above, I grant the judicial review orders of certiorari,

prohibition and mandamus in respect of all the titles the subject of the consolidated judicial review proceeding to, respectively, quash the Gazette Notices Nos. 11533, 15570 and 15572 of 2010 and prohibit the Respondents from acting upon the decision to revoke the Applicants' titles and compel the restoration or reinstatement of the Applicants as the registered owners of the suit properties.

(11) For avoidance of doubt, the decision here relates only to the registrar's action purporting to revoke by the Gazette Notices set out herein the Applicants' titles to the suit parcels of land. **The decision does not affect the pending court proceedings on the validity of the allotment and title to some of the suit property.** It also does not affect the State's right to acquire by due process of compulsory acquisition and payment of compensation for any or all of the parcels of land the subject of these proceedings.

(12) The Respondents will pay to the Applicants costs of the judicial review proceedings.

Dated and delivered this 6th day of September 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Applicants for the Ex Parte Applicants

Mr. Eredi for the Respondents

Miss Linda Court Clerk